

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District
Name (under which you were convicted): OMAR VAZQUEZ-AVENDANO		Docket or Case No.: 7:16-CR-00876-11
Place of Confinement: FCI, OAKDALE		Prisoner No.:
UNITED STATES OF AMERICA		Movant (include name under which convicted) V. OMAR VAZQUEZ-AVENDANO

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

United States District Court
Southern District of Texas
FILED

APR 30 2019

David J. Bradley, Clerk

(b) Criminal docket or case number (if you know): 7:16-CR-00876-11

2. (a) Date of the judgment of conviction (if you know): 7/5/2017

(b) Date of sentencing: 9/18/2017

3. Length of sentence: 196-MONTHS AND 5-YEAR PROBATION

4. Nature of crime (all counts):

Conspiracy to Possess With Intent to Distribute 5 kilograms or more of Cocaine
In violation of 21 U.S.C Section 846, 841(a)(1), and 841(b)(1)(A).

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☐

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8. Did you appeal from the judgment of conviction?

Yes ☒No ☐

9. If you did appeal, answer the following:

(a) Name of court: UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(b) Docket or case number (if you know): No. 17-41015

(c) Result: DENIED

(d) Date of result (if you know): 8/4/2018

(e) Citation to the case (if you know): United States v. Vazquez-Avendano, No. 17-41015 (5th Cir. 2018)

(f) Grounds raised:

Anders v. California Brief.

Anders v. California, 386 U.S. 738 (1967).

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): N/A

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or application concerning this judgment of conviction in any court?

Yes ☐No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

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- (4) Nature of the proceeding: _____
- (5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the fact supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT PROPERLY ARTICULATING A MOTION TO SUPPRESS EVIDENCE FROM AN ILLEGAL SEARCH THAT TOOK PLACE AT VAZQUEZ-AVENDANO'S HOUSE AT THE TIME OF HIS ARREST. FRUIT OF THE POISONOUS TREE.

(See. Memorandum in Support of Motion Attached.).

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

THE RECORD WAS NOT SUFFICIENTLY DEVELOPED

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

- (3) Did you receive a hearing on your motion, petition, or application?

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise the issue:

GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT THE SUPREME COURT MANDATES OF ALLEYNE V. UNITED STATES, 133 S. CT 2251. IN RESPECT TO DRUG AMOUNTS AND CURRENCY ATTRIBUTABLE TO VAZQUEZ-AVENDANO.

(See. Memorandum in Support of Motion Attached.).

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

THE RECORD WAS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE ARGUMENT

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise the issue:

N/A

GROUND THREE: INEFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO
OBJECT TO THE MISAPPLICATION OF THE GUIDELINES UNDER SECTION
2D1.1 (B)(1).

(See. Memorandum in Support of Motion Attached.).

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

THE RECORD WAS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE ARGUMENT

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise the issue:

GROUND FOUR: INEFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

WHETHER COUNSEL RENDER INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE MISAPPLICATION OF THE GUIDELINES UNDER SECTION 3B1.1(b).

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

THE RECORD WAS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE ARGUMENT

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

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Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise the issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

ALL GROUNDS IN THIS MOTION WERE NOT PREVIOUSLY PRESENTED IN FEDERAL COURTS

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

N/A

(b) At the arraignment and plea:

GUY L. WOMACK GEOFFREY L. WOMACK

(c) At the trial:

(d) At sentencing:

GUY L WOMACK, 609 HEIGHT BLVD, HOUSTON, TX. 77007

(e) On appeal:

UNKNOWN

(f) In any post-conviction proceeding:

N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

N/A

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Petitioner's direct appeal was denied on September 4, 2018.

A one-year period of limitation shall run from this date. The latest of the date on which the judgment of conviction become final. Petitioner one-year limitation runs from September 4, 2018 and shall have until September 4, 2019. Additionally, 90-days are to be added, because he did not file for writ of certiorari in the United States Supreme Court. See. *Clay v. United States*, 537 U.S. 522 (2003).

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered

Therefore, movant asks that the Court grant the following relief:

Petitioner prays that this honorable Court Vacate his Sentence and Conviction
or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on April 25, 2019
(month, date, year)

Executed (signed) on April 25, 2019 (date)

Omar Varquez-Arendano.
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.